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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF
THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

FREEMAN H. RINGER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE ALLIANCE OF SOCIAL SECURITY DISABILITY RECIPIENTS AND THE GRAY PANTHERS IN SUPPORT OF RESPONDENTS' POSITION

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the Gray Panthers

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BRIEF AMICI CURIAE

INTERESTS OF AMICI

Pursuant to Supreme Court Rule 36, counsel for the petitioner and the respondents have consented to the filing of their brief amici curiae. Their letters of consent have been filed with the Clerk of the Court.

The Alliance of Social Security

Disability Recipients is an organization founded to serve disability applicants and recipients. The Alliance was formed by disability recipients, their family members and concerned citizens in response to harsh, unfair and illegal denials and terminations of disabled Americans by the Social Security Administration (SSA) which is under the jurisdiction of the Secretary of the Department of Health and Human Services (HHS). At this time, the Alliance has approximately 3,000 members in eighteen states. The members of the Alliance are aware of the important role which the federal courts have played in curbing abuses in the Social Security and Supplemental Security Income (SSI) disability programs by reviewing the final decisions of the Secretary. They are particularly concerned that the federal courts' jurisdiction to review the Secretary's decisions under 42 U.S.C.

§405(g), as interpreted by this Court and the Circuit Courts of Appeals, be preserved and they do not believe that 42 U.S.C. §405(h) precludes mandamus jurisdiction.

The Gray Panthers is a national organization comprised of approximately 40,000 individuals who reside throughout the United States. "Dedicated to helping the Nation's elderly," Schweiker v. Gray Panthers, 453 U.S. 34,40 (1981), its members seek to reform and improve various laws and institutions which affect the lives of the nation's elderly, including the Social Security, Supplemental Security Income, and Medicare programs. They share the concerns of the Alliance of Social Security Disability Recipients that this Court preserve the jurisdictional bases available to individuals injured by actions of the Secretary of Health and Human Services in these three programs.

SUMMARY OF ARGUMENT

1. The Secretary raises many issues which are not properly before the Court and which amici suggest this Court should not address. These issues have not received the benefit of thorough development in the lower courts which should precede review by this Court.

2. Jurisdiction exists under 42 U.S.C. §405(g) to address the procedural challenges raised by the respondents. The respondents have properly filed a "claim" and further exhaustion of administrative remedies would be futile.

3. The Secretary suggests that only she is capable of determining when further exhaustion of administrative remedies would be futile. This approach disregards this Court's decisions in Mathews v. Eldridge, 424 U.S. 319 (1976), and Mathews v. Diaz, 426 U.S. 67 (1976), and should not be adopted by this Court.

4. While amici believe that this Court need not reach the issue of whether 42 U.S.C. §405(h) precludes mandamus jurisdiction, if the Court does reach the issue, amici argue that mandamus jurisdiction is available and not barred by §405(h).

I. The Secretary's brief raises issues which are not properly before the Court.

Amici are concerned by the breadth with which the Secretary has painted the issues before the Court in this case. For example, the Secretary raises arguments regarding the legal enforceability of the Secretary's voluntary decision to waive the "benefit" exception for rulemaking under the Administrative Procedure Act, 5 U.S.C. §553 (Pet.Br. p. 31) See, discussion infra at page 40, footnote 8. This issue has never been raised before in this litigation. Amici respectfully suggest that because this issue has not benefited from development in the lower courts and

and need not be reached in order for this Court to dispose of the appeal, this Court should not address the issue on this appeal.

Similarly, the Secretary discusses Medicare Part B as well as Part A claims as if both kinds of claims were before the Court in this case. Amici urge the Court to consider only the Part A jurisdictional issues. Part B claims procedures are very different from Part A, involving limited hearing rights before carrier-supplied decision-makers rather than administrative law judges (ALJs) and no further appeal or judicial review thereafter. The Ninth Circuit Court of Appeals did not consider or rule on Part B issues. The record is thus wholly inadequate for consideration of jurisdictional or substantive issues relating to Part B claims.

Finally, both the Secretary and the respondents have supplied this Court

with detailed information regarding the bilateral carotid body resection ("BCBR"). Amici are not medical experts and express no opinion regarding the value of this procedure. Further, they suggest that the ultimate decision on the merits of this procedure is irrelevant to the jurisdictional issues which are properly before this Court.[1/]

[1/] The procedural posture of this case raises some questions regarding whether review by this Court was improvidently granted. For example, the record in this case does not reflect that the district court ever granted the motion to file an amended complaint, despite the fact that the amended complaint appears to be the focus of the Ninth Circuit's decision. In their original complaint, filed on September 18, 1980, respondents challenged on procedural grounds a Health Care Financing Administration (HCFA) Manual provision that prohibited payment for BCBR but was not binding upon ALJs or the Appeals Council. After the case was filed, on October 28, 1980, the government issued a Ruling that also barred payment for BCBR but was binding upon ALJs and the Appeals Council. While the underlying substantive rule apparently remained the same, its procedural enact-

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ment and application were changed substantially by the new Ruling. Plaintiffs' challenge to the rule is largely procedural. Although plaintiffs attempted to file an amended complaint in the district court specifically attacking the new Ruling (J.A. 9-33), their motion to amend was never acted upon by the district court. While the named plaintiffs' claims will apparently be determined under the old Manual provision, all current and future claims will be determined under the new HCFA Ruling.

The issuance of the new Ruling raises mootness and standing issues in this case. In similar circumstances, this Court has held that the promulgation by the governmental defendant of a new regulation during the pendancy of litigation rendered the plaintiffs' original claims moot. Richardson v. Wright, 405 U.S. 208, 209 (1972). Further, because it does not appear that the Ringer plaintiff beneficiaries' claims will be determined pursuant to the new Ruling, it does not appear that they have suffered any actual or threatened harm as a result of issuance of the Ruling. For this reason, if their claims will not be affected by the Ruling, questions exist as to whether they lack standing to challenge the new Ruling.

II. Jurisdiction exists under 42 U.S.C. §405(g) to address the procedural challenges raised by the respondents.

A. Identification of the issues.

Amici are concerned that the Secretary has framed the jurisdictional issues here in the extreme. This case does not provide the wide range of issues suggested by the Secretary nor justify the extreme solutions which the Secretary proposes. In fact, amici suggest that, in order to dispose of this appeal, this Court needs only to address one or two of the procedural issues raised by the respondents.[2/]

Amici believe that this Court should address two of the issues raised in

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[2/] For purposes of the remainder of this brief, amici ignore their concerns noted in footnote 1, regarding the current posture of this litigation. For this purpose, they join the parties and the Ninth Circuit in relying upon the amended complaint despite the fact that the district court never acted upon the motion to file the amended complaint.

the respondents' complaint:

1. Respondents' challenge to the Secretary's failure to comply with the procedural requirements of the Administrative Procedure Act, 5 U.S.C. §553 et seq., when she issued her ruling regarding BCBR in the Federal Register on October 28, 1980. Respondents alleged that the Secretary failed to provide an opportunity for public notice and comment prior to the issuance of the final rule. [Amended Complaint, Count Ten, ¶s 63 and 66; Prayer for Relief ¶4—[3]]

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[3] Paragraph 63 provides:

"The coverage Issues Appendices to the 'Medicare Carriers Manual' the 'Medicare Intermediary Manual' and the HCFA BCBR Ruling which provide that BCBR surgery is never a reasonable and necessary treatment of obstructive pulmonary conditions were issued without valid, legal, or proper notice of proposed rulemaking." (emphasis added) [J.A. 21]

Paragraph 66:

"As a result of defendant's failure to issue the policy precluding Medicare

(continued on next page)

2. Respondents' challenge to the Secretary's policy of permitting different levels of review to operate under different adjudicative standards, resulting in denials of reimbursement at one level while at the next two levels, reimbursement would be granted, if the beneficiary endured and pursued an appeal to the next level, as violative of the Fifth Amendment. [Amended Complaint, Count Three, ¶s 37 and 39 and Prayer for

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coverage of BCBR pursuant to the rule-making procedures specified by the Administrative Procedure Act, the requirements of 5 U.S.C. §553(b), 5 U.S.C. §706(2)(D) and 42 U.S.C. §1395hh have been violated and the exclusion from coverage of BCBR surgery contained in the Appendices is accordingly null and void and of no effect." [J.A. 21-22]

Prayer for Relief, ¶4, requested the court to:

"Declare that the Appendices and Ruling described in paragraph 3 above were issued without public notice or public participation, in violation of 5 U.S.C. §553, 5 U.S.C. §706, and 42 U.S.C. §1395hh and are therefore null and void and of no effect;" [J.A. 26]

Relief, ¶9.[4/]

As amici will discuss infra, jurisdiction exists for both of these challenges pursuant to 42 U.S.C. §405(g).

[4/] Paragraph 37 provides:

"Further, defendant's policy precluding Medicare coverage of the costs of BCBR unless payment is ordered by the Appeals Council or by an administrative law judge applies two standards of eligibility for Medicare benefits, one for beneficiaries who seek a hearing before an administrative law judge and one for beneficiaries who do not or are unable to obtain a hearing before an administrative law judge." [J.A. 17]

Paragraph 39:

"Defendant's policy arbitrarily and illegally discriminates against Medicare beneficiaries such as plaintiffs claiming Part A or Part B benefits for BCBR or desiring to obtain such treatment, and denies plaintiffs and the members of the class they represent equal protection of the laws in violation of the Fifth Amendment to the Constitution of the United States." [J.A. 18]

Prayer for Relief, ¶9:

"Declare that defendant's actions described herein deprive plaintiffs of equal protection of the laws in violation of the due process clause of the Fifth Amendment and enjoin defendant, preliminarily and permanently, from future violations." [J.A. 26]

As a result, the Court need not reach the issue of whether 42 U.S.C. §405(h) precludes mandamus jurisdiction. In addition, due to the nature of these two procedural issues, being preliminary to a ruling on the substantive issues raised by the respondents, if the Court rules that jurisdiction exists for either of these claims, the Court need not address the jurisidictional issues raised by the remainder of the respondents' complaint. For example, if this Court finds that jurisdiction exists for the district court to review the respondents' challenge to the Secretary's failure to comply with the public notice and comment procedures of the Administrative Procedure Act, the district court would then be required to review the merits of respondents' claim. As the Secretary made no effort to comply with the APA and does not even suggest that she did, it is

likely that the district court will require the Secretary to fulfill her obligations pursuant to the APA. At that point, the substantive issue of the availability of reimbursement for BCBR treatment would be fully developed, providing the courts with a more complete record should the Secretary's determination be challenged at a later date. Similarly, if this Court finds jurisdiction over the respondents' Fifth Amendment challenge to the Secretary's practice of permitting different adjudicative standards to exist at successive levels of review, invalidation of the challenged scheme would require the Secretary to adopt, pursuant to the APA, uniform standards. Pursuant to the public notice and comment requirements of the APA, the administrative record would then be available for review if further challenges were to be filed.

B. The challenges which this Court should address are procedural.

The respondents challenged the Secretary's issuance of the 1980 "ruling" without providing the opportunity for public notice and comment prior to the issuance of the final rule. [Amended Complaint, ¶s 63,66; Prayer for Relief, ¶4, set forth at footnote 3, supra.] While the Ninth Circuit held that jurisdiction exists for the respondents' APA challenge under federal question and mandamus jurisdiction, amici believe that the Court need not reach these issues because §405(g) provides jurisdiction for this challenge, at least with regard to those respondents who sought reimbursement for the BCBR procedure.

The APA challenge is purely procedural. A ruling by a court that the Secretary must comply with the public notice and comment requirements in no way requires a decision on the merits of

the substantive issue involved. The challenge is thus "entirely collateral to [the] substantive claim of entitlement." Mathews v. Eldridge, 424 U.S. 319, 330 (1976).

Similarly, the respondents' constitutional challenge to the Secretary's practice of permitting different adjudicative standards to exist at different levels of review [Amended Complaint, ¶s 37, 39; Prayer for Relief, ¶9, set forth at footnote 4, supra] represents a procedural challenge. A decision by the district court that the Secretary's standards must be uniform at all levels of review would leave the Secretary free, subject to constitutional and statutory limitations, to determine what standard would be applied at all administrative levels of review.

Despite the procedural nature of these claims, the Secretary has argued

that the respondents' procedural challenges "were 'inextricably intertwined with [its] challenge of the validity of the determination denying them Medicare coverage.'" Ringer v. Schweiker, 697 F.2d 1291, 1294 (9th Cir. 1982) Before this Court, the Secretary argues that the procedural issues are so "intimately bound up" (Pet.Br. p. 47) that they become inseparable. This is an extremely advantageous position for the Secretary: if adopted by the Court virtually no procedural issue could be considered "collateral" to the claim for benefits, Mathews v. Eldridge, 424 U.S. 319,330 (1976).

However, courts have generally rejected this effort by the Secretary to blur the lines between different, quite separable issues. For example, in Adams v. Califano, 474 F.Supp. 974, 981 (D.Md. 1979), affd. sub nom. Adams v. Harris, 643 F.2d 995 (4th Cir. 1981), the court

stated:

> Obviously, any procedural matter can conceivably affect the outcome of the substantive claim, and the plaintiffs contend here that it has. But that does not mean the procedural question is "inextricably intertwined" with the substantive claim. A procedural matter is sufficiently collateral to the substantive claim of entitlement when it has nothing to do with the issues involved in the determination of disability. See Caswell v. Califano, 583 F.2d 9, 14 & n. 11 (1st Cir. 1979).

The Court should reject the Secretary's efforts to obfuscate the issues raised in this case.

C. Respondents meet the requirements of §405(g) to raise their procedural challenges.

In Mathews v. Eldridge, 424 U.S. 319, 328 (1976), this Court delineated the parameters of its decision in Weinberger v. Salfi, 422 U.S. 749 (1975), that "the requirement that there be a final decision by the Secretary was regarded as 'central to the requisite grant of subject-matter jurisdiction...'

422 U.S. at 764." Id. at 328:

> Implicit in Salfi, however, is the principle that this condition consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The non-waivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no 'decision' of any type, and some decision by the Secretary is clearly required by the statute.

With regard to their procedural claims, the respondents have met both the waivable and non-waivable portions of the Salfi test.

(i) The respondents have filed "claims" with the Secretary.

Respondents Holmes, Webster-Zieber and Vescio each filed a claim for reimbursement with the fiscal intermediary (Amended Complaint, ¶5, J.A. 11), after having undergone BCBR. The claims of Holmes and Webster-Zieber had been denied

by the intermediary pursuant to the manual instructions before the filing of the amended complaint. Id. These requests for reimbursement fall squarely within the limitations established in Salfi. There, the unnamed class members had not satisfied the requirements of §405(g) because the complaint did not allege "that they even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought." 422 U.S. at 764. Here, the respondents not only filed claims but they also received decisons denying their claims. In Mathews v. Diaz, 426 U.S. 67, 76 (1976), this Court found that the "claims" requirement had been met when the plaintiff filed an application for benefits and the Secretary had stipulated that the application would be denied. Unlike in this case, the Diaz

plaintiff had not even obtained a formal decision of denial from the Secretary at any level of review. By affirmatively filing a request for reimbursement and obtaining a decision on the request, the respondents have met the "claim" requirement.

(ii) Further exhaustion of administrative remedies should be waived.

The very nature of these procedural issues renders full exhaustion of administrative remedies inappropriate and unnecessary.

In Salfi, this Court recognized that there are benefits to be derived from requiring exhaustion of administrative remedies. It is "generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit

of its experience and expertise, and to compile a record which is adequate for judicial review." 422 U.S. at 765. However, "[o]nce a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." Id. at 765-6.

With regard to the respondents' APA challenge, the Secretary's issuance of the Ruling without providing for the opportunity for public notice and comment represents the Secretary's considered opinion that she would not comply with the APA's requirements. It would be futile for the respondents to have pursued their claims further in an

effort to obtain compliance with the APA. Just as with the procedural challenge raised in Eldridge, "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." 424 U.S. at 330; see also Diaz, 426 U.S. at 76. It is equally unlikely that either an ALJ or the Appeals Council could or would seriously consider the statutory procedural challenge which the respondents raise.

An unfavorable decision for the Secretary by a court reviewing the APA challenge that the Secretary failed to provide public notice and comment will be far more detrimental to the agency if it is delayed for many months, or years than a decision shortly after the APA

violation occurred. The outcome could be not only the requirement that the Secretary properly seek public notice and comment but also the invalidation of her regulation back to the date of issuance. See, for example, Buschmann v. Schweiker, 676 F.2d 352, 357-8 (9th Cir. 1982) [invalidating an improperly issued HHS regulation in the Supplemental Security Income program for the period "from December 1974 until promulgation of the final rule on July 7, 1978."]

The respondents' constitutional challenge to the failure to provide uniform standards for adjudicating decisions raises similar issues. The Secretary is not required to consider the challenge in the administrative review process. Eldridge, 424 U.S. at 330. In addition, the failure to correct the constitutional flaw results in elderly and disabled individuals being forced

to be extremely persistent in order to assure that reimbursement is paid. If they do not appeal, possibly believing that a correct standard was applied, they will be saddled with a substantial medical bill.[5/] Even if they do appeal, they will have been forced to take part in an entire level of review which, by virtue of utilizing a more restrictive standard than the higher level of review, is essentially a sham. There is no justification for requiring the elderly and/or disabled Medicare beneficiary to exhaust all appeals in order to challenge the Secretary's failure to provide uniform standards at all levels of review. In Califano v. Yamasaki, 442 U.S. 682, 689 (1979), the plaintiffs had filed suit after the Secretary refused to halt recoupment of

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[5/] The record does not appear to reflect the cost of the BCBR procedure.

the alleged overpayment while their appeal proceeded. In that case, the Secretary "concede[d] that jurisdiction over the claims of the named plaintiffs was proper under §205(g)." 442 U.S. at 698. This case is no different: the procedural issues should be addressed separate from and prior to consideration of the substantive claims in order to assure that all substantive claims are properly and fairly adjudicated.

The cases challenging unreasonable delays in the Secretary's administrative appeals process present a similar situation. In those cases, the Secretary has argued unsuccessfully that the person must have had a hearing in order to satisfy the second requirement of §405(g). In Caswell v. Califano, 435 F.Supp. 127, 133 (D.Me. 1977), affd. 583 F.2d 9 (1st Cir. 1978), the court stated that it would be

> "ironic if the very delay now under attack which prevents the exhaustion of administrative remedies through no fault of the plaintiffs, constitutes a barrier to this Court's jurisdiction under §405(g)."

Similarly, here, it would be ironic if the plaintiffs had to endure the application of varying standards at each level of review in order to challenge the constitutionality of the process by which such inconsistent standards are permitted to exist.

D. It is appropriate for federal courts to determine that the Secretary has waived further exhaustion despite the Secretary's opposition to this finding.

Even if this court concludes that the Ninth Circuit erred in finding that further exhaustion was waived, amici urge this Court not to adopt the position advanced by the Secretary.

The Secretary asks this Court to substantially restrict its rulings in

Salfi, Eldridge, and Diaz. Put simply, the Secretary believes that only she is entitled to decide whether further exhaustion of administrative remedies would be futile. (Pet.Br. p. 38) Further, it is the Secretary's position that exhaustion would only be futile where an individual challenges the constitutionality of a statutory provision. See 20 C.F.R. §404.900(a)(6). The absurdity and harshness of this approach is reflected in numerous decisions of this Court and lower courts. There are many other circumstances where it would be completely futile to exhaust administrative remedies further and where to require such exhaustion would impose incredible hardships upon the claimants or beneficiaries involved. A few examples suggest how extreme the Secretary's position is:

1. There have been many cases where, despite the fact that the Secretary

claimed that there could be some benefit derived from further exhaustion, she also had filed a motion for summary judgment, representing to the court that "there is no genuine issue as to any material facts and...the moving party is entitled to a judgment as a matter of law." Fed. R.Civ.Proc. 56(c). In Mathews v. Diaz, 426 U.S. 67 (1976), the Secretary had filed a motion to dismiss, but "at the hearing on the motion he stipulated that no facts were in dispute, that the case was ripe for disposition by summary judgment, and that the only issue before the District Court was the constitutionality of the statute." Id. at 76. This Court held that, "For jurisdictional purposes, we treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements...We conclude, as we did in Salfi,

the the Secretary's submission of the question for decision on the merits by the District Court satisfied the statutory requirement of a hearing and final decision." Id. at 76-77. See also Wilson v. Edelman, 542 F.2d 1260, 1272-3 (7th Cir. 1976), noted in this Court's review, sub nom. Schweiker v. Wilson, 450 U.S. 221, 227-8 (1981) [This Court noted that the Seventh Circuit had "reversed the dismissal, holding that the Secretary had waived any requirement of exhaustion by her submission of the case to the District Court for summary disposition."]; Liberty Alliance of the Blind v. Califano, 568 F.2d 333, 346 (3d Cir. 1977) ["In concluding that the Secretary had waived the exhaustion requirement, the Court in Diaz reasoned that there were no facts in dispute, that the Secretary had filed a motion for summary judgment, and that the only issue was a constitutional one.

As in Diaz, the Secretary here filed a motion for summary judgment, thus suggesting that the case was appropriate for judicial resolution..."]

2. In recent years, there have been occasions in which the policy or practice of the Secretary which was being challenged has been all but etched in stone. Consistent with this Court's decision in Eldridge,[6/] in such cases the courts have felt comfortable in concluding that the Secretary's policy or practice was not likely to change or be seriously reviewed simply because one beneficiary raised the issue on appeal. For example, in Kuehner v. Schweiker, No. 82-1514 (3d Cir. September 19, 1983), the Third

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[6/] "It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge." Mathews v. Eldridge, 424 U.S. 319, 330 (1976).

Circuit Court of Appeals held that disabled OASDI and SSI beneficiaries who had received notices of termination and who had filed appeals could properly challenge the Secretary's failure to consider whether their conditions had medically improved under §405(g). The Secretary had previously issued "rulings of non-acquiescence," stating that she did not intend to follow two decisions of the Ninth Circuit Court of Appeals, Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981), and Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982). These two cases addressed the issues raised by the plaintiffs in Kuehner. The Social Security Administration (SSA) had also issued a memo to all SSA staff instructing them not to follow these decisions. (Slip. Op. p. 5).[7/] As a

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[7/] Amici note that the Secretary took this position despite her contrary representations to this Court in Califano v.
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result, the Third Circuit concluded:

> Fairly read, the complaint alleges that the Social Security Administration's position on the challenged procedures is final. The government has filed no affidavit to the contrary. The nonacquiescence memorandum of February 23, 1982 referred to above suggests rather strongly that the plaintiffs will be able to prove the allegation. But in any event, for purposes of this Fed.R.Civ.P. 12(b)(1) ruling the allegation in the complaint controls and puts the case squarely within Liberty Alliance. (Slip. Op. p. 9)

Similarly, in Rivera v. Heckler, Civil No. 82-3331 (D.N.J. June 29, 1983), plaintiffs challenged the Secretary's failure to follow judicial precedent on

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Yamasaki, 442 U.S. 682, 699 (1979). Arguing that class certification was not permitted under §405(g), the Secretary told the Court that she would follow Circuit Court of Appeals decisions unless she appealed: "Restricted judicial review will not have a detrimental effect on the administration of the Social Security Act, the Secretary says, because he will appeal adverse decisions or abide [by] them within the jurisdiction of the courts rendering them."

two specific issues: (1) the Secretary refused to give substantial weight to the opinion of the claimant's treating physician, even when this opinion was uncontradicted by substantial evidence, in violation of Smith v. Schweiker, 671 F.2d 788, 792-93 (3d Cir. 1982), and Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981); and (2) the Secretary refused to give proper weight to the claimant's subjective complaints regarding pain in assessing the nature of the person's disabling condition, see Smith v. Califano, 637 F.2d 968, 972 (3d Cir. 1981). Citing Salfi, 422 U.S. at 765-66, the district court concluded that "exhaustion of administrative remedies here would serve no useful purpose." [Slip. op. page 6] Specifically:

> Adherence to a position of nonacquiescence to judicial precedent, even in the face of consistent reversal by ALJs, firmly evidences that the Secretary has taken a final

> position and is not willing to change. [citations omitted] When, as here, it is alleged that DDD [the state disability determination service regulated by the Secretary] is forcing claimants to pursue lengthy administrative appeals because the Secretary persists in promulgating standards for eligibility that are contrary to the law of the circuit, requiring exhaustion serves no useful function. (Slip. Op. page 7)

3. There have been other situations such as the one originally challenged in this case, where the Secretary permitted different standards of adjudication to exist at different levels of review. In these situations, the most restrictive interpretations have been utilized at the lowest levels of review. In Jones v. Califano, 576 F.2d 12 (2d Cir. 1978), plaintiffs challenged an HHS policy by which an SSI retroactive payment was to be reduced due to the receipt of Aid to Families with Dependent Children (AFDC). If a person appealed, the

administrative law judge would reverse the Secretary, but HHS would not change its policy. "By doing nothing the Secretary could effectively evade judicial review for many claimants who fail to contest [the formula used.]" 576 F.2d at 19.

These factual patterns suggest, as does her limited regulation, that the Secretary will never find waiver of administrative remedies to be appropriate unless the plaintiff seeks to challenge the constitutionality of a provision of the Social Security Act. As a matter of litigation strategy, she has opposed, and will continue to oppose, waiver regardless of the absurdity of that position. Her effort here to limit waivers to situations falling within her regulation simply emphasizes the need for a judicial role in assessing the appropriateness of waiver.

The Secretary's main justification

for arguing that this Court should restrict waiver of exhaustion to situations falling within her extremely limited regulation appears to be that this approach would eliminate uncertainty as to when waiver is available, "thereby making it unnecessary for the parties to engage in extensive litigation on this question in subsequent judicial proceedings and unnecessary for the court in those proceedings to infer from what otherwise might be ambigious circumstances whether the Secretary had actually concluded that further administrative proceedings are not required." (Pet. Br. p. 41) (emphasis added) There are at least three problems with this approach. First, as described supra, the situations evaluated by the courts have not been "ambiguous." The futility of further exhaustion has been readily apparent from the Secretary's actions. Second, the Secretary has apparently

concluded that judicial review of her decisions is not beneficial. As a result, she issued the unreasonably limited regulations for waiver which she now asks this Court to approve. Third, almost all of the "extensive litigation" on these jurisdictional issues has been precipitated by the Secretary's unwillingness to ever acknowledge to a court that she has made a final decision on a particular issue, regardless of how well documented her position is or the fact that she has already filed a motion for summary judgment in the action. As a result, the Secretary herself already controls the mechanisms for reducing the substantial litigation on these issues: she needs only to evaluate the challenges filed in light of a reasonable reading of this Court's decisions in Salfi, Eldridge, Diaz and Yamasaki.

20 C.F.R. §404.900(a)(6) should be viewed as one basis for waiving jurisdic-

tion. This Court's decisions in Salfi, Eldridge and Diaz represent a second, very necessary basis which should be preserved.

III. The exercise of mandamus jurisdiction approved by the Court of Appeals is not precluded by section 205(h) of the Social Security Act, 42 U.S.C. §405(h).

This Court must address the question whether the lower court's assumption of mandamus jurisdiction in this case was permissible only if the Court finds that jurisdiction for the respondents' claims is not available pursuant to the jurisdictional provision of the Social Security Act, 42 U.S.C. §405(g). However, if this Court does reach the issue of mandamus jurisdiction, amici submit that this issue was properly resolved by the Court of Appeals.

In urging reversal of the Court of Appeals' approval of the exercise of mandamus jurisdiction, the Secretary argues that she does not have a "clear

duty" to the respondents, characterizing the alleged duty to be the "determination whether BCBR is a reasonable and necessary medical service." [Pet. Br. pp. 35-36] Amici believe the duties here are very different from, and much clearer than, that described by the Secretary. First, it is the Secretary's constitutional duty to assure that all levels of the administrative review process adhere to the same standards in adjudicating cases. Second, it is the Secretary's statutory duty to assure that she complies with the public notice and comment requirements of the Administrative Procedure Act when she issues standards to be utilized at all levels of the administrative decision and review process.[8/]

[8/] As the Secretary notes, HHS (then HEW) waived the "benefit" exemption in the APA in 1970. See 36 Fed. Reg. 2532 (February 5, 1971). The Secretary argues that this

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memorandum was just a "statement of internal policy" and did not create any legally enforceable rights. (Pet.Br. p. 31) Amici do not believe that this issue is before the Court, see discussion at page 5, supra, and urge the Court not to address the issue in the context of this appeal. Amici also disagree with the Secretary's position. Once the Secretary has waived the benefits exemption, she is "fully bound to comply thereafter with the procedural demands of the APA." Rodway v. U.S. Department of Agriculture, 514 F.2d 809, 814 (D.C.Cir. 1975). See also Humana of South Carolina v. Califano, 590 F.2d 1070, 1084 (D.C.Cir. 1978); National Welfare Rights Organization v. Mathews, 533 F.2d 637, 646 (D.C.Cir. 1976); Kollett v. Harris, 619 F.2d 134, 143-144 (1st Cir. 1980); Tyson v. Maher 523 F.2d 972, 976 (2nd Cir. 1975); Arlington Oil Mills Inc. v. Knebel, 543 F.2d 1092, 1095 (5th Cir. 1976); Buschman v. Schweiker, 676 F.2d 352, 355 (9th Cir. 1982). These cases are consistent with decisions of this Court holding that once an agency voluntarily agrees to follow certain standards, it is obligated to comply with the standards. See Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954); Service v. Dulles, 354 U.S. 363, 388 (1959); Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Morton v. Ruiz, 415 U.S. 199, 232 (1974). Further, it is only recently that the Secretary has adopted this position. Compare Buschman v. Schweiker, 676 F.2d 352, 356 n. 4 (9th Cir. 1982) ["Although 5 U.S.C. §553(a)(2) would have exempted the rulemaking procedure now in dispute, the then-Secretary of Health, Education and Welfare, in a policy statement dated

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If this Court rules that the Secretary has no duty in this particular circumstance, it need not reach the issue of whether mandamus jurisdiction is available, in light of §405(h). As discussed infra, amici believe that the history of the federal courts' mandamus jurisdiction, especially as that history relates to the enactment of §205(h), 42 U.S.C. §405(h), requires a conclusion §405(h) does not preclude mandamus jurisdiction.

42 U.S.C. §405(h) provides, in relevant part, that:

> "No findings of fact or decision of the Secretary shall be reviewed

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January 28, 1971, (36 F.R. 2532), required all agencies and offices in his department to utilize the public participation procedures of §553. The Secretary does not contest his legal obligation to comply with §553 procedures." (emphasis added)] with HHS' proposed rules stating that "voluntary use of the notice and comment procedures is meant as a guideline rather than as a right enforceable at law," 47 Fed. Reg. 26860 (June 22, 1982).

> by any person, tribunal, or government agency except as herein provided. No action against the United States, the Secretary, or any officer, or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this sub-chapter." 9/

At the time the foregoing language was enacted in 1935, 49 Stat. 624, section 41 of Title 28 of the United States Code comprised most grants of subject matter jurisdiction to the federal courts. It did not, however, include mandamus jurisdiction which at that time was grounded entirely in the common law of the District of Columbia. Mandamus had been

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9/ The codifiers have substituted "under sections 1331 or 1346 of title 28" for "under section 41 of Title 28" in 42 U.S.C. §405(h). This change was made without any change by the Congress of the statutory language. See "codification" note, following 42 U.S.C. §405, Cumulative Pocket Part, United States Code Annotated (1983).

available in the courts of the District of Columbia as a non-statutory remedy to compel performance of duties owed by federal officials since the establishment of the District as the nation's capitol. See McIntyre v. Wood, 11 U.S. (7 Cranch) 504 (1813); Kendall v. United States, ex. rel. Stokes, 37 U.S. (12 Pet.) 524 (1838). Since the prohibitions in §405(h) contained, at the time they were enacted, absolutely no reference to common law mandamus jurisdiction, there is no basis for the Secretary's inference that §405(h) was intended to restrict the ability of persons owed duties by federal officials to enforce them in the courts of the District of Columbia.

In 1948, section 41 of Title 28 was recodified, and its jurisdictional grants restated. Mandamus jurisdiction, however, continued to be grounded exclusively in

the common law and to be available only in the United States District Court for the District of Columbia.

In 1962, Congress acted to end the historical anomaly which required any person, no matter where he lived, to bring a claim in the nature of mandamus in the District of Columbia. The Mandamus and Venue Act of 1962, Pub.L. No. 87-748 (October 5, 1962), was enacted to provide "a remedy by which ... jurisdiction [over federal officers and employees formerly exercised in the District of Columbia courts] could be exercised throughout the country." Smith v. United States, 330 F.2d 70, 72 (10th Cir. 1964). This expansion of the venue for proceedings in the nature of mandamus was in no way designed either to expand or constrict the substantive breadth of the jurisdictional grant. The accompanying codification of common law mandamus juris-

diction at its present location, 28 U.S.C. §1361, in no way changed the relationship of the mandamus power to other grants of subject matter jurisdiction in existence at the time of such codification.

The foregoing history provides no support for the Secretary's contention that the current appearance of the federal courts' mandamus power in the portion of the United States Code that succeeds section 41 of Title 28 means that the mandamus power was abrogated by the enactment of section 405(h). If section 405(h) did not affect common law mandamus jurisdiction at the time it was enacted, which it plainly did not, it cannot be said to undermine an identical substantive grant of jurisdiction merely because the expansion of the venue within which that grant could be exercised required that it be codified within Title 28.

The Secretary admits that the mandamus

provision was not included in "Section 41 of Title 28" (Pet.Br. p. 33), but argues nevertheless that the "'sweeping' language of the third sentence of section 405(h)" should be interpreted as "barring jurisdiction under the mandamus statute whenever jurisdiction over the particular suit under 28 U.S.C. §1331 also would be barred." (Pet.Br. p. 34) First, if the Congress intended "to channel all judicial review through 42 U.S.C. §405(g)" (Pet.Br. p. 34), it could have specifically precluded all other forms of review. Compare 38 U.S.C. §211(a), discussed in Salfi, 422 U.S. at 761. Second, the Secretary here frames the limitation upon mandamus jurisdiction as being coextensive with the bar upon §1331 jurisdiction. (Pet.Br. p. 34) Amici believe that the Secretary is offering a new interpretation which implies that, to the extent that §1331 jurisdiction and mandamus jurisdiction are not co-extensive, mandamus jurisdic-

tion is available, regardless of §405(h). This new approach completely undermines the Secretary's broader position that the language of 405(h) is so sweeping that it must necessarily be read to preclude all jurisdictional bases. Prior to 1976, §1331 jurisdiction was not available where the amount in controversy did not exceed $10,000. P.L. 94-574, 90 Stat. 2721 (1976). See discussion in Califano v. Sanders, 430 U.S. 99 (1977). As a result, it logically follows from the Secretary's argument that, prior to 1976, a beneficiary was entitled to seek mandamus jurisdiction where the amount in controversy was $10,000 or less. This would mean that §405(h) does not provide the complete bar to jurisdiction which the Secretary contends and undermines her argument that the Congress ever intended to preclude mandamus jurisdiction.

In sum, if, as the Court of Appeals

found, the district courts' jurisdiction over respondents' claims was properly founded on 28 U.S.C. §1361, that jurisdiction was not precluded by section 405(h). Should this court find it necessary to review the decision of the Court of Appeals upholding the exercise of mandamus jurisdiction, amici respectfully urge that that decision be affirmed.

CONCLUSION

Should the Court determine that this appeal is properly before it, amici urge the Court to limit its decision to the issue of jurisdiction over the procedural challenges required to dispose of the appeal. Further, they urge this Court to find that 42 U.S.C. §405(g) provides jurisdiction for these challenges. If, however, the Court concludes that §405(g) jurisdiction is not available, amici urge that the Court find that §405(h) does not preclude mandamus jurisdiction for these challenges and that mandamus

jurisdiction was appropriate in this case.

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